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**UNITED STATES BANKRUPTCY COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

In re	No.	01-30923 DM
PACIFIC GAS AND ELECTRIC	Chapter	11
COMPANY,	Date:	October 21, 2002
Debtor.	Time:	1:30 p.m.
	Ctrm:	235 Pine Street, 22 <sup>nd</sup> Floor
		San Francisco, California

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR PG&E'S MOTION FOR  
AUTHORITY TO PAY LEGAL FEES OF UNDERWRITER'S COUNSEL SKADDEN ARPS**

PG&E has moved the court for authorization to pay Skadden Arps, a law firm, pursuant to §363 (b)(1), <sup>1/</sup> for legal serviced rendered on behalf of Lehman Brothers an underwriter who is not employed by the estate. This motion is objectionable in at least two respects. First, Skadden is a professional who must be, and has not been, employed pursuant to §§ 327 and 330. Payment of a professional pursuant to § 363 is a flagrant circumvention of the Code and Rules governing the employment and compensation of professionals in bankruptcy. This frontal assault on §§ 327 and 330 of the Code and Rules 2014 and 2016 is without precedent, and it will undermine, if not wholly eviscerate, the oversight and control of professional's employment and fee awards envisioned by law.

<sup>1/</sup> Under § 363(b)(1), the court may approve use, sale or lease of property out of the ordinary course of business.

1 Second, as Lehman Brothers' employment has not been approved or even sought,  
2 none of its expenses can be paid by the estate. Skadden's fees are the underwriter's  
3 responsibility or PG&E's parent who apparently has employed Lehman. This is as it should  
4 be, given that Skadden's duty is to protect its employer, the underwriter, not the Debtor.  
5 The reasonableness of paying of the underwriter's' legal fees can only be determined if the  
6 underwriter seeks to be employed, and there is considerable doubt that Lehman can be  
7 employed by the estate, as it has long worked for PG&E's parent on matters that would  
8 create a conflict.

9 There is no question that Skadden Arps is a professional, attorneys performing legal  
10 services. If they are being employed to do legal work that benefits the Debtor by assisting in  
11 its potential reorganization, then they must be employed pursuant to §327 and Rule 2014.

12 The BAP has previously stated that:

13 [c]ourt approval of employment for a debtor in possession is *sine qua non* to counsel  
14 getting paid. Failure to receive court approval for employment of a professional in  
accordance with § 327 and Rule 2014 precludes the payment of fees.

15 *In re Weibel*, 176 B.R. 209, 211 (9<sup>th</sup> Cir. BAP 1994), *citing*, *In re Shirley*, 134 B.R., at  
16 943-4 (9<sup>th</sup> Cir. BAP 1992); *accord*, *In re Atkins*, 69 F.3d 970, 973 (9<sup>th</sup> Cir.1995)  
(*citing*, *Weibel*)

17 In *Atkins*, *Weibel* and *Shirley*, the Ninth Circuit and the BAP made it clear that all alternative  
18 theories including, but not limited to, §503 and *quantum meruit* cannot be used to pay  
19 debtor's professionals when they have not met the procedural and substantive requirements  
20 of the Code §327 and Rules, 2014. See also, *In re Monument Auto Detail, Inc.* 226 B.R.  
21 219 (9<sup>th</sup> Cir. BAP 1998).

22 Section 363 is simply another prohibited circumvention, and Debtor cites no case  
23 where it has been used to pay a professional working for the benefit of a debtor. On the  
24 contrary, there is a case with somewhat similar circumstances where the legal fees for an  
25 employed real estate broker were denied. *In re Auto Parts Club, Inc.*, 191 B.R. 848 (Bankr.  
26 S.D. Cal. 1996)(even though fees for seeking fees are compensable, the real estate  
27 broker's attorney's fees could not be paid from the estate because the attorney had not  
28 sought prior approval in compliance with §327 and Rule 2014).

1 PG&E has not, but must, establish that the professional's first duty is to the estate  
2 and that they hold no adverse interest. On the face of it, it would seem Skadden may never  
3 prove this, since the agreement and duty of loyalty are to the underwriters who are not  
4 employed, and, furthermore, they may never seek employment due to conflicting  
5 representation of PG&E's parent.  
6

7 Dated: October 16, 2002

Respectfully submitted,

Patricia A. Cutler  
Assistant U.S. Trustee

By: 

Attorneys for U.S. Trustee  
William T. Neary

1 **PROOF OF SERVICE**

2  
3 I, the undersigned, state that I am employed in the City and County of San Francisco, State  
4 of California, in the office of the United States Trustee, at whose direction the service was made; that  
5 I am over the age of eighteen years and not a party to the within action; that my business address is  
6 250 Montgomery Street, Suite 1000, San Francisco, California 94104, that on the date set Out below,  
7 I served a copy of the attached:

8 **UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR PG&E'S MOTION FOR  
9 AUTHORITY TO PAY LEGAL FEES OF UNDERWRITER'S COUNSEL SKADDEN ARPS**

10 by placing such a copy, enclosed in a sealed envelope, with prepaid postage thereon, in the United  
11 States mail at San Francisco, California, addressed to each party listed below.

12 James L. Lopes, Esq.  
13 William J. Lafferty, Esq.  
14 Howard Rice Nemerovsky et al.  
15 Three Embarcadero Center, 7th Floor  
16 San Francisco, CA 94111-4065

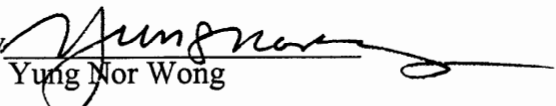
415-217-5910 (Also Via Fax )

17 Michael P. Kessler, Esq.  
18 Weil, Gotshal & Manges LLP  
19 767 Fifth Ave  
20 New York, NY 10153

21 Robert Jay Moore, Esq.  
22 Milbank Tweed Hadley et al  
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24 Los Angeles, CA 90017

25 Alan W. Kornberg, Esq.  
26 Paul, Weiss, Rifkind, Wharton  
27 & Garrison  
28 1285 Ave of the Americas  
New York, NY 10019

29 I declare under penalty of perjury that the foregoing is true and correct. Executed at San  
30 Francisco, California on October 16, 2002.

31 By   
32 Yung Nor Wong